

Louisiana Law Review

Volume 34 | Number 3

Employment Discrimination: A Title VII Symposium

Symposium: Louisiana's New Consumer Protection

Legislation

Spring 1974

The Partner as a Third Party Tortfeasor: Liability or Immunity Under the Workmen's Compensation Act

Randy J. McClanahan

Repository Citation

Randy J. McClanahan, *The Partner as a Third Party Tortfeasor: Liability or Immunity Under the Workmen's Compensation Act*, 34 La. L. Rev. (1974)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol34/iss3/15>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

and that to those multiple obligations mentioned in article 2077³¹ must be added another type as yet unnamed.

Carolyn Hazel

THE PARTNER AS A THIRD PARTY TORTFEASOR: LIABILITY OR IMMUNITY UNDER THE WORKMEN'S COMPENSATION ACT

Under the Louisiana workmen's compensation law, the employer is afforded immunity from suit brought by an injured employee.¹ In cases where the injury is caused by a third party tortfeasor who is not the employer, however, recovery from the employer or his insurer does not preclude suit by the injured employee against the third party.² Thus, a plaintiff seeking recovery in workmen's compensation is encouraged to have his tortfeasor judicially recognized as a "third party."³ Various problems may arise, however, when "third party

31. LA. CIV. CODE art. 2077: "Where there are more than one obligor or obligee named in the same contract, the obligation it may produce may be either several or joint or *in solido*, both as regards the obligor and the obligee."

1. "The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations." LA. R.S. 23:1032 (1950). See also Comment, 33 LA. L. REV. 325 (1973).

2. "When an injury for which compensation is payable under this Chapter has been sustained under circumstances creating in some person (in this Section referred to as third person) other than the employer a legal liability to pay damages in respect thereto, the injured employee or his dependent may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the injured employee or his dependent against such third person, . . . and such injured employee or his dependent may obtain damages from or proceed at law against such third person to recover damages for the injury." LA. R.S. 23:1101 (1950).

3. Assuming plaintiff's only recourse for injuries is workmen's compensation, his potential for recovery is severely limited by statute. For example, the maximum compensation allowed is \$65.00 per week for a period of 500 weeks if the injury causes death or permanent disability. LA. R.S. 23:1202 (1950), as amended by La. Acts 1973, No. 71; LA. R.S. 23:1221 (1950), as amended by La. Acts 1968, Ex. Sess. No. 25 § 5; LA. R.S. 23:1231 (1950), as amended by La. Acts 1968, Ex. Sess. No. 25 § 6.

Medical expenses are generally limited to \$12,500.00. LA. R.S. 23:1203 (1950), as amended by La. Acts 1952, No. 322 § 1; 1956, No. 282 § 1; 1968, No. 103 § 1.

On the other hand, if plaintiff is successful in arguing that his tortfeasor is a third party not his employer, he may recover both workmen's compensation from his employer, and he may additionally recover an amount virtually unlimited in tort from his tortfeasor. ("[T]he payment or award of compensation hereunder shall not . . .

party" status is sought to be attached to a natural or juridical person occupying two or more separate but contemporaneous roles.

In *Leger v. Townsend*⁴ the court considered whether a partner of a partnership covered by the Workmen's Compensation Statute can be sued as a third party on an injury arising out of the partnership enterprise.⁵ In that case, it was held that the partner could not be sued as a third party unless he was shown to be a co-employee of the injured employee.⁶ The question was again considered in *Cockerham v. Consolidated Underwriters*⁷ and *Bersuder v. New Orleans Public Service, Inc.*,⁸ where the courts of appeal in each case followed the reasoning of *Leger*.⁹ To date, the Supreme Court of Louisiana has denied writs.¹⁰ Consequently, based upon the composite holdings of *Leger*, *Cockerham* and *Bersuder*, a partner is not a "third party" under the Workmen's Compensation Statute unless he is an "employee" of the partnership.¹¹ For a partner to be recognized as an employee of the partnership he must show that he was "under a contract of employment, whereby he received wages or some other specific remuneration from the partnership in addition to his share of the profits as a partner."¹²

be regarded as establishing a measure of damages for the injury. . . ." LA. R.S. 23:1101 (1950)).

4. 257 So. 2d 761 (La. App. 3d Cir. 1972), writ refused, 261 La. 464, 259 So. 2d 914 (1972).

5. *Id.* at 762. The injury was clearly compensable under the Workmen's Compensation Statute, hence plaintiff, in an effort to increase his recovery to a greater amount than that limited by statute, was seeking to have the partner judicially recognized as a third party tortfeasor under LA. R.S. 23:1101 (1950). This would have enabled plaintiff to recover in tort for the partner's nonfeasance, in addition to the \$15,000 he had received in compensation benefits. 257 So. 2d 761, 762.

6. *Id.* at 763.

7. 262 So. 2d 119 (La. App. 2d Cir. 1972), writ refused, 262 La. 315, 263 So. 2d 49 (1972).

8. 273 So. 2d 46 (La. App. 4th Cir. 1973).

9. *Bersuder v. New Orleans Pub. Serv., Inc.*, 273 So. 2d 46, 48 (La. App. 4th Cir. 1973); *Cockerham v. Consolidated Under.*, 262 So. 2d 119, 122 (La. App. 2d Cir. 1972).

10. "Writ denied. The judgment is correct." *Cockerham v. Consolidated Under.*, 262 La. 315, 263 So. 2d 49 (1972). "Application is denied; the result is correct." *Leger v. Townsend*, 261 La. 464, 259 So. 2d 914 (1972).

11. The practical implications of the courts' conclusion become readily apparent: Because the partner is not a "third party" his identity as partner is merged with the identity of the partnership and he enjoys the employer's immunity from actions in tort by virtue of the Workmen's Compensation Act.

12. *Carpenter v. New Amsterdam Cas. Co.*, 159 So. 2d 757, 760 (La. App. 3d Cir. 1964). As authority for the requirement that the partner draw a wage in order to be classified as an "employee," the courts rely largely on the *Carpenter* decision. There is some authority, however, for the proposition that a partner is an employee of the

Under Louisiana's civil law system, the partnership is a separate and distinct entity from its partners. In *Trappey v. Lumbermen's Mutual Casualty Co.*,¹³ plaintiff was both partner and employee of the partnership. Upon sustaining injuries in the course of his employment, he sought recovery under the partnership's workmen's compensation policy. Although prior jurisprudence held that a partner could not be both employer and employee under the Workmen's Compensation Act, the court awarded recovery because plaintiff was an employee of the partnership entity.¹⁴ Since the *Trappey* decision, the *entity theory of partnership* has become firmly embedded in Louisiana law.¹⁵ As a legal entity, the partnership is:

partnership solely by virtue of the fact that he receives remuneration in terms of a percentage of the partnership profits. (See note 20 *infra*). Such an approach would seem to be completely consistent with Louisiana's entity theory of partnership. (See note 15 *infra*). Nevertheless, this proposition was expressly rejected in *Carpenter*. The rule remains that if the partner is to be considered an employee, he must receive a wage or some other specific remuneration; his share of the profits alone is not sufficient.

13. 229 La. 632, 86 So. 2d 515 (1956).

14. Prior to the *Trappey* decision there were apparently only two Louisiana cases dealing with the subject of a partner seeking recovery as employee under the Workmen's Compensation Act: *Dezendorf v. National Casualty Co.*, 171 So. 160 (La. App. 2d Cir. 1936) and *Harper v. Ragus*, 62 So. 2d 167 (La. App. 2d Cir. 1953). Based upon the common law theory of the partnership as an *aggregate* of its partners, the court concluded that a partner could not be both employer and employee under the Act.

When the same question was presented to the First Circuit in *Trappey*, however, the court rejected the common law authority supporting *Dezendorf*, and found that in Louisiana, based upon its civil law traditions, the partner was an *entity* separate and apart from its partners. Consequently, the partner could be both partner and employee of the partnership, and was allowed recovery in workmen's compensation. *Trappey v. Lumbermen's Mut. Cas. Co.*, 77 So. 2d 183 (La. App. 1st Cir. 1954).

Since the Second Circuit's decisions in *Dezendorf* and *Harper* conflicted with the First Circuit's decision in *Trappey*, the Louisiana supreme court granted certiorari. Its decision was to affirm the conclusion reached by the First Circuit; the "common law" aggregate theory of partnership was rejected, and the civilian concept of the partnership as a separate entity was adopted. *Trappey v. Lumbermen's Mut. Cas. Co.*, 229 La. 632, 86 So. 2d 515 (1956). See note 15 *infra*.

15. The Louisiana entity theory of partnership, as stated in *Trappey*, has received summary acceptance in civil cases. See, e.g., *Birmingham Fire Ins. Co. v. Adolph*, 379 F.2d 948 (5th Cir. 1967); *State v. Morales*, 256 La. 940, 945 n.3, 240 So. 2d 714, 716 n.3 (1970); *Sugar v. State*, 243 La. 217, 223, 142 So. 2d 401, 403 (1962); *Johnson v. Johnson*, 235 La. 226, 239, 103 So. 2d 263, 267 (1958); *Kline v. Dawson*, 230 La. 901, 912, 89 So. 2d 385, 389 (1956); *Meyers v. Southwest Region Conf. Ass'n. of Seventh Day Adventists*, 230 La. 310, 325, 88 So. 2d 381, 386 (1956); *Manuel v. Jennings Lbr. Co.*, 231 So. 2d 458, 460 (La. App. 3d Cir. 1970); *Apex Sales Co. v. Abraham*, 201 So. 2d 184, 188 (La. App. 4th Cir. 1967); *R.J. Robinson & Son v. Houston Fire & Cas. Co.*, 200 So. 2d 776, 777 (La. App. 3d Cir. 1967); *Little v. Caterpillar Tractor Co.*, 169 So. 2d 654, 659 (La. App. 1st Cir. 1964); *Quarles v. Albritton*, 116 So. 2d 175, 178 (La. App. 1st Cir. 1959); *Modicut v. Rist*, 98 So. 2d 268, 269 (La. App. 1st Cir. 1957). See also

an abstract ideal being with legal relations separate and distinct from those of its individual members; . . . 'The partnership once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compile it. It is a civil person, which has its peculiar rights and attributes. . . . [T]he partners are not the owners of the partnership property. *The ideal being* thus recognized by a fiction of law, *is the owner*; it has a right to control and administer the property, to enable it to fulfil its legal duties and obligations; and *the respective parties*, who associated themselves for the purpose of participating in the profits which may accrue, *are not the owners of the property itself*, but of the residuum which may be left from the entire partnership property, after the obligations of the partnership are discharged.'¹⁶

It is apparent that the conclusions of *Leger*, *Cockerham* and *Bersuder* run counter to the well-established entity theory. Because the partnership is a separate entity from its partners, under the Workmen's Compensation Act the partner is a separate being from the partnership,¹⁷ and thus cannot consequently obtain the employer's immu-

AM. JUR. *Partnership* § 114 (1942); *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Workmen's Compensation*, 17 LA. L. REV. 350 (1957); Fuller, *Taxation of Louisiana Professional Partnerships as Associations*, 35 TUL. L. REV. 723, 731 (1961).

There was originally much confusion as to whether the entity theory of partnership was applicable in criminal cases. The landmark case was *State v. Peterson*, 232 La. 931, 95 So. 2d 608 (1957), which denied the entity theory, holding that a partner could not commit theft of partnership funds. See also *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Criminal Law*, 18 LA. L. REV. 120, 121 (1957) (criticizing *Peterson* as irreconcilable with the "firmly established" rule of *Trappey*). Whatever confusion may have existed, however, was firmly settled with the case of *State v. Morales*, 256 La. 940, 240 So. 2d 714 (1970), which specifically overruled *Peterson* and held that a partner could commit theft of partnership funds because the partnership was a legal entity, separate and distinct from the partners in composition thereof. For a thorough treatment concerning the development of and reasons for the Louisiana entity theory of partnership, see the decision of the First Circuit Court of Appeal in *Trappey v. Lumbermen's Mutual Casualty Co.*, 77 So. 2d 183, 185-89 (La. App. 1st Cir. 1954).

16. *Trappey v. Lumbermen's Mut. Cas. Co.*, 229 La. 632, 635-36, 86 So. 2d 515, 516-17 (1956) (Emphasis added.)

17. The inability of the courts to find "third party" status on the part of the partner is made especially difficult to understand when taken in context with the factual situation of *Trappey*. When viewed contemporaneously, it appears that the partner is a "third party" when seeking to recover workmen's compensation as an employee, but *is not* a "third party" for purposes of assuming responsibility for his negligent conduct. See *State v. Morales*, 256 La. 940, 945 n.3, 240 So. 2d 714, 716 n.3 (1970).

ity. Such immunity is obtained only as a result of being the employer, and the shoes of employer are properly worn by the partnership, not the partner.

The courts have used specious reasoning in implying that liability might attach to the partner only if he is also an employee of the partnership. The Third Circuit suggests in *Leger* that if the partner had been a co-employee he would have qualified as a third person under the Workmen's Compensation Act.¹⁸ However, the only reason a partner can become an employee of the partnership is by virtue of the fact that the partner is a third person.¹⁹ Consequently, for the court to conclude that a partner must be an employee to become a "third person" requires the application of a circuitous argument.²⁰ A partner is a third party whether he is an employee or not.

18. *Leger v. Townsend*, 257 So. 2d 761, 763 (La. App. 3d Cir. 1972). See also *Vidrine v. Soileau*, 38 So. 2d 77 (La. App. 1st Cir. 1948) which said that as an employee of the partnership, the partner could be sued as a co-employee of the plaintiff, and the statutory restrictions of the Workmen's Compensation Law would not be available to him. "While it is true that plaintiff, an employee, cannot sue his employer in a tort action, there is no reason why he cannot sue another employee of his employer." *Id.* at 80. "There is . . . no reason, we can see, for exempting one employee from liability for his torts causing damage to another employee." *Id.* at 81. The view that if the partner had been a co-employee, he would have qualified as a "third person" was summarily adopted in *Cockerham v. Consolidated Underwriters*, 262 So. 2d 119, 122 (La. App. 2d Cir. 1972), and *Bersuder v. New Orleans Public Service, Inc.*, 273 So. 2d 46, 48 (La. App. 4th Cir. 1973).

19. "[T]he reason that a partner may be considered an employee of his partnership is that, as *Trappey* explains, a civil-law partnership is a legal entity or person separate and distinct from the individual partners who compose it." *Manuel v. Jennings Lbr. Co.*, 231 So. 2d 458, 460 (La. App. 3d Cir. 1970).

20. It is appropriate to mention that an argument can be made for the proposition that under the entity theory of partnership, a partner is an employee of the partnership *per se*. The statute provides a presumption of employee status for purposes of workmen's compensation: "A person rendering service for another in any trades, businesses or occupations covered by this Chapter is presumed to be an employee under this Chapter." LA. R.S. 23:1044 (1950). Under the entity theory, the partner and the partnership are separate beings, the partner deriving whatever remuneration he receives from the partnership. Because the partnership produces monetary or other returns for the partner, the requirements of R.S. 23:1044 appear to be satisfied, at least insofar as the working partner is concerned, because the partner is rendering service for another (the partnership). If this approach is correct, then the working partner, being an "employee" of the partnership *per se*, would be responsible as a "third party" even under the *Leger* test. Such an approach would eliminate the difficulty found in *Carpenter*, which requires the drawing of a wage for the partner to earn co-employee status, a requirement that is somewhat dubious upon careful analysis. See also *Meyers v. Southwest Region Conf. Ass'n. of Seventh Day Adventists*, 230 La. 310, 88 So. 2d 381 (1956); *Carpenter v. New Amsterdam Cas. Co.*, 159 So. 2d 757, 761 (La. App. 3d Cir. 1964) (Tate, J., dissenting); W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 71 (Supp. 1964).

Although corporate officers and directors are "third parties" under the compensation statute and thus amenable to suit in tort for their negligent acts,²¹ the courts refused to extend the corporate officer doctrine to render members of a partnership liable in tort for an injury to a partnership employee compensable under the statute.²² As justification, the courts pointed out that the partner, unlike the corporate officer, may become personally liable for a portion of the workmen's compensation benefits to the injured employee.²³ This is an unfortunate distinction. In *State v. Peterson*²⁴ the Louisiana supreme court held that a partner who misappropriated funds of the partnership could not be prosecuted for theft because a partner in a commercial partnership could ultimately be liable for all of the debts of the partnership;²⁵ thus, the taking was not of something belonging to another.²⁶ Upon careful reconsideration of the issue, however, the court specifically overruled *Peterson* in *State v. Morales*.²⁷ The rea-

21. *Adams v. Fidelity and Cas. Co.*, 107 So. 2d 496 (La. App. 1st Cir. 1958). See also *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973).

22. *Bersuder v. New Orleans Pub. Serv., Inc.*, 273 So. 2d 46, 47 (La. App. 4th Cir. 1973); *Cockerham v. Consolidated Under.*, 262 So. 2d 119, 121 (La. App. 2d Cir. 1972).

23. "There are vast distinctions in the status of a corporate officer or director and a member of a partnership. Corporate officers and directors cannot, as a general rule, become personally liable for any debts or obligations of the corporation. They would not, therefore, personally pay any portion of workmen's compensation benefits to the injured employee. To the contrary, the individual partners of an ordinary partnership as herein involved are individually responsible for their pro rata share of the partnership debts. La. Civ. Code art. 2873. Should the partnership assets be insufficient to pay a compensation claimant, then the ordinary partners would be jointly liable for this indebtedness. Citation omitted." *Cockerham v. Consolidated Under.*, 262 So. 2d 119, 121 (La. App. 2d Cir. 1972); *Bersuder v. New Orleans Pub. Serv., Inc.*, 273 So. 2d 46, 47 (La. App. 4th Cir. 1973).

24. 232 La. 931, 95 So. 2d 608 (1957).

25. "Ordinary partners are not bound *in solido* for the debts of the partnership, and no one of them can bind his partners, unless they have given him power so to do, either specially or by the articles of partnership. Commercial partners are bound *in solido* for the debts of the partnership." LA. CIV. CODE art. 2872.

26. "Although the liability of the individual partners of a commercial partnership comes into existence and becomes enforceable after the dissolution of the partnership, it follows that they are still eventually liable for unpaid partnership debts. Since the liability is *in solido*, any commercial partner is faced with the eventual obligation of having to pay all outstanding claims against a dissolved partnership. . . .

"Therefore, if a man can be held liable for an entire debt of a commercial partnership of which he is a member, the commercial partnership cannot be classed as 'another' apart from himself." *State v. Peterson*, 232 La. 931, 940, 95 So. 2d 608, 612 (1957).

27. 256 La. 940, 240 So. 2d 714 (1970). See also *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Criminal Law & Procedure*, 18 LA. L. REV. 119 (1957); *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Partnership*, 32 LA. L. REV. 232 (1972); Note, 32 TUL. L. REV. 120 (1957).

soning in *Morales* indicated a recognition that although the partner may *ultimately* be personally liable for all or part of the partnership debt, the *primary* obligation is owed solely by the partnership entity, not the partners individually.²⁸ As a result, the partnership was found to be a separate entity — “another” — from which the crime of theft could be committed.

Regardless of whether the partnership is ordinary or commercial,²⁹ any personal liability the partners may ultimately incur is secondary, and as such only becomes enforceable when the partnership entity becomes insolvent.³⁰ By basing the distinction between the corporate officer and a member of a partnership on this secondary liability of the partner for his solidary or pro rata share of the partnership debts, the courts are returning to the reasoning of the *Peterson* case which was specifically declared to be incorrect by the supreme court in *Morales*. Consistent analysis indicates that a partnership is a legal entity entirely separate and distinct from the persons who compose it and may have its own creditors and debtors.³¹ The partner becomes personally liable to those creditors only when the partnership assets are insufficient to meet its obligations.³²

28. “In Louisiana, during the existence of a partnership its assets are *not* held in indivision by the partners, and the partners are *not* coproprietors of the assets; rather, the assets belong to a single owner, the fictitious person, the partnership. We specifically overrule *State v. Peterson* . . . , in its holding that a partner cannot commit theft from the partnership.” *State v. Morales*, 256 La. 940, 945, 240 So. 2d 714, 716 (1970). See also *Brinson v. Monroe Auto. & Sup. Co.*, 180 La. 1064, 158 So. 558 (1934); *Smith v. McMicken*, 3 La. Ann. 319 (1848).

29. Ordinary partners are liable only for their virile share of the debts of the partnership. LA. CIV. CODE art. 2873. Commercial partners are liable *in solido* for the debts of the partnership. LA. CIV. CODE art. 2872.

“The court in the *Peterson* case seems to have based its decision on the fact that each partner in a commercial partnership can be held liable for the entire debt of the partnership. This implies that a different result might be reached in a case involving the misappropriation of property belonging to an ordinary partnership by one of the partners, since ordinary partners are liable only for their virile share of the debts of the partnership. Whether the partnership is commercial or ordinary, the practical and legal considerations are essentially the same, and it is highly doubtful that such a distinction will be made or could be justified.” *The Work of the Louisiana Supreme Court of the 1956-1957 Term—Criminal Law & Procedure*, 18 LA. L. REV. 119, 122 (1957).

30. *Leger v. Townsend*, 257 So. 2d 761, 763 (La. App. 3d Cir. 1972).

31. *E.B. Hayes Mach. Co. v. Eastham*, 147 La. 347, 84 So. 898 (1920).

32. “[W]hile the ultimate liability of partners is *in solido*,—i.e. joint and several,—they, during the life of the partnership, cannot be charged individually except through the partnership; that is, during the life of the partnership a partner is . . . liable and made to respond individually only through a judgment against the intellectual being of which he is a component part. . . . [T]he proposition of law here

The Louisiana courts of appeal, apparently reluctant to impose tort liability on the partner in addition to compensation liability on the partnership, have molded a rule that the partner is not a third party under the Workmen's Compensation Act unless he is an employee of the partnership. Such a rule cannot be reconciled with the Louisiana entity theory of partnership under which an employee is properly employed by the partnership entity rather than the partner. The partner is a third party regardless of any employee status he might have with the partnership, and the employer's immunity under the Workmen's Compensation Act should properly attach to the partnership rather than the partner. By changing their positions in *Leger*, *Cockerham* and *Bersuder*, the courts could remain faithful to the entity theory by holding that the partner, like the corporate officer, is a third party. Since the overruling of *Peterson*, the partner and the corporate officer may not be distinguished by the mere fact that the primary obligation of the partnership is also the secondary obligation of the partner.

Randy J. McClanahan

NONRESIDENT TUITION: CHIPPING AWAY AT THE BLOCKADE

In *Vlandis v. Kline*,¹ two University of Connecticut students challenged a Connecticut statute² that irreversibly classified them as nonresidents for the entire period of their attendance at the university. Claiming that they were bona fide residents of Connecticut, the students argued that the state's statutory definition of residence for tuition purposes violated their constitutional rights to due process and equal protection. The United States District Court held the statute invalid and granted injunctive relief.³ On appeal, the United States Supreme Court affirmed, *holding* that the due process clause forbids classification based on:

presented must be maintained as resulting from our peculiar law, though it would be true in no other state of the Union. Elsewhere the partners are always individually liable, and the partnership as a distinct being cannot be cited. In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the citation may be served upon the firm by service upon the partner." *Liverpool, Brazil & River Platte Nav. Co. v. Agar & Lelong*, 14 F. 615 (Circuit Court, E.D. La. 1882).

1. 412 U.S. 441 (1973).

2. CONN. GEN. STAT. REV. § 10-329b, as amended by Public Act No. 5, § 126 (1971).

3. *Kline v. Vlandis*, 346 F. Supp. 526 (D. Conn. 1972).